United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 29, 2004

TO : Alan B. Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: California Overnight
Case 32-CA-20678

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This Section 8(a)(1), (3), and (5) case was submitted for advice on three issues. First, did the Employer successfully convert its delivery drivers from employees to independent contractors? Second, if not, and the drivers remained employees, did the Union disclaim interest by negotiating an Effects Agreement permitting the termination of employees and allowing the Employer to negotiate individual independent contractor agreements with the drivers? Finally, if the drivers are still employees and the Union did not disclaim interest, is the Effects Agreement enforceable?

We find that the delivery drivers remained statutory employees at all times and that the Union did not disclaim interest in representing them. We further find that the Effects Agreement is inapplicable and unenforceable because the drivers remained unit employees, and the Effects Agreement is premised on their conversion to independent contractor status. Because the Effects Agreement is unenforceable, the Employer was not authorized to deal directly with employees, and the individual collective bargaining agreements are unenforceable. Thus, the terms and conditions of the expired collective bargaining agreement should be restored pending negotiation of a new agreement.

FACTS

A. Background.

California Overnight (the Employer) is a division of Express Messenger, a company engaged nationwide in shipping and delivery of mail and packages. The Employer has 15 facilities in the states of California, Arizona, and Nevada. For a number of years, Teamsters Automotive Employees Local Union No. 665 (the Union) has represented a unit of around 280 owner-operator drivers who work out of the Burlingame, San Jose and Hayward, California facilities. The

approximately 688 drivers at the Employer's other twelve facilities are unrepresented. The most recent collective-bargaining agreement between the parties was effective by its terms from July 1, 2000, until July 1, 2003.[1]

B. Bargaining Over Conversion to Independent Contractors and Effects Bargaining.

On March 27, the Employer's Vice President, Rick Chase, sent a letter to Union representative Dan Lynch advising him that the Employer had discontinued using owner-operator employee drivers in November 2002 in favor of independent contractors in all its nonunion plants and was considering implementing the change at the unionized facilities. The Employer requested to meet with the Union to bargain about the decision to subcontract bargaining unit work. Chase then called Lynch in early April, again stating that the Employer wanted to discuss the proposed conversion.

On April 11, Chase sent a second letter to Lynch outlining his previous proposal and expressing the Employer's desire, if the conversion decision was made, to give employees sufficient notice to apply for independent contractor status. On April 15, Lynch replied to Chase, confirming an April 21 meeting but advising Chase that the Union would not be prepared to enter into collective-bargaining negotiations at that time.

At the parties' April 21 meeting, Chase told the Union that the Employer wanted to meet as soon as possible to negotiate over the conversion to independent contractors. Lynch took his insistence to mean that the Employer wanted to go straight into effects bargaining. Since the Union was not yet prepared to negotiate, however, it told the Employer that it considered the April 21 meeting to be informational only. Lynch told Chase that the Union would be prepared for actual negotiations on May 6 and 7. During the April 21 meeting, Chase also gave the Union a package of information from Subcontracting Concepts, Inc. (SCI), a company that screens and refers qualified independent contractor drivers to companies in need of their services. The package consisted of a sign-up package for drivers containing a sample independent contractor agreement between SCI and the drivers and other necessary forms such as DMV permits and W-9 forms.

When the parties met again on May 7, the Union presented its proposals for a new collective-bargaining

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[1] All dates hereinafter are in 2003, unless otherwise indicated.

agreement, but Chase stated that the Employer wanted to go forward in converting the drivers to independent contractors. Chase told the Union that if the drivers did not want to accept the conversion, the Employer would have SCI provide drivers to replace them. Chase further stated that the drivers would be terminated on July 1 and that those drivers who had not signed up with SCI would be out of work. Lynch concluded that the Union could not legally stop the actual conversion of its unit drivers to independent contractors and decided to enter into effects bargaining.

After the meeting, the Union presented the Employer with a written request for information containing a few questions relevant to effects bargaining, as well as several questions regarding the job duties and terms and conditions of employment of the drivers after the planned conversion. These questions included whether there would be a guarantee of a minimum number of pickups; whether there would be a maximum number of independent contractors that the Employer would use; what pickup and delivery fees would be paid to the independent contractors; and what the annual cost would be for insurance and vehicle maintenance. The Union also asked questions about the relationship between SCI and the Employer.

On May 12, the Employer provided a written response to the Union's information request. The Union did not object to any omissions in this response and did not ask for further information.

The parties met again on May 22, by which date the Union was resigned to the Employer's decision to convert the unit employees to independent contractors and concentrated only on effects bargaining. Between that date and May 30, the parties agreed on an Effects Agreement. The final details of this Agreement, confirmed in letters from Chase to Lynch dated May 21[2] and May 30, included the following:

(1) All current drivers would be terminated on July 1;

(2) The drivers would receive COBRA notices, and their "final paychecks" would contain a pro-rata portion of their annual service bonus;

(3) All current drivers who applied to become independent contractors would be given "priority treatment" in hiring by the Employer, as long as they met the SCI's requirements; and

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[2] It appears that the Employer incorrectly dated the May 21 letter a few days early than it wrote it.

(4) The Employer agreed to negotiate into each independent contractor's agreement additional monetary compensation if the driver had been covered under its medical plan.

C. The Union Begins to Doubt the Independent Contractor Status of the Employees, Files The Instant Charge, and Demands Recognition.

When it entered into the Effects Agreement, the Union had thought that SCI would act as the Employer's subcontractor and would provide the independent contractor drivers. After entering into the Agreement, however, the Employer began directly negotiating independent contractor agreements with the drivers even though SCI actually signed the Agreements. The Union was unaware at the time of entering into the agreement that the Employer would negotiate these agreements, which are between the drivers and SCI, not the Employer. In addition, SCI had no presence at the facilities, and the Employer was directly soliciting applications from new drivers. The Union also learned the following: the drivers were going to be driving the same routes as before, with essentially the same pickup and delivery times; they would report to the same warehouses; they would have the same managers and dispatchers; they would be required to follow the same procedures; and they would wear the same uniforms. The Union concluded that the only difference was that after the alleged conversion, the drivers' compensation package was different and the terms of the collective bargaining agreement no longer applied.

On June 23, more than a week before the July 1 conversion date, the Union filed the instant charge alleging that the Employer had failed to bargain in good faith, threatened to terminate employees on account of Union organization, and interfered with their Section 7 rights.[3] On July 2, the Union sent a letter to the Employer demanding that it recognize and bargain with the Union and requesting a list of all current employees, their rates of pay, and a copy of each of the individual independent contractor agreements. By letter dated July 17, the Employer refused to provide the requested information or to recognize the Union, claiming that the Employer no longer employed any statutory employees.

The Union filed an amended charge on January 16, 2004, alleging that the Employer unlawfully withdrew recognition

[3] The Region has determined that the Employer did not bargain in bad faith in negotiating to subcontract the bargaining unit work or in effects bargaining.

from the Union, refused to provide information, made unilateral changes, and refused to bargain in good faith.

D. Facts Regarding Independent Contractor Status.

1. The SCI Independent Contractor Packet.

The SCI "independent contractor" packet provided to the Union and to the unit drivers contained several documents, including: an Independent Contractor Owner/Operator Agreement between the independent contractor and SCI (described in detail below); a "Welcome Letter" from SCI, listing benefits offered through SCI; a "Confidentiality And Non-Disclosure Agreement" between the independent contractor and the Employer, prohibiting the independent contractor from allowing its "affiliates" access to confidential information or from assigning or transferring the Confidentiality Agreement without the Employer's prior written consent; and several forms, such as an "Independent Contractor Set-up Form," instructions for obtaining required DMV permits and insurance in California, and W-9 IRS forms.

To become a SCI "independent contractor, SCI required the drivers to own or have the legal right to use a van, minivan, truck; possess a valid "Motor Carrier of Property Permit;" carry "Business Auto" or "Commercial" automobile insurance with a minimum combined limit of $300,000; pass a medical examination required by the Department of Transportation; demonstrate proof of all required insurances and amounts; and demonstrate skills and experience as a package delivery driver.

Once a contractor has met all of the above SCI requirements, the contractor is free to negotiate directly with the Employer to service one of its routes. Neither SCI nor the Employer provides training to the contractors regarding how to service their routes, although SCI does provide assistance to the drivers in completing the necessary independent contractor forms. Before July 1, the Employer employed a "trainer" and held a weekly driver's training course that included "ride alongs." Since July 1, both the trainer job and course have been eliminated. The Employer now provides a voluntary orientation session that covers documentation and scanner issues and has informally trained new drivers as necessary.

The following portions of the Independent Contractor Agreement are particularly relevant to the independent contractor issue:

Paragraph Two: The Employer "may" furnish drivers with a uniform containing the California Overnight logo which

should be worn, when required by the Employer or its customers, when performing services for the Employer, in return for a marketing fee paid by the Employer. This uniform must be removed when the drivers make deliveries for other companies during their regular work hours. (In practice, it appears that the employees, if not required, are strongly encouraged to wear the uniform and that most do so).

Paragraph Three: The independent contractor must provide and maintain all equipment in good operational condition and must replace any disabled equipment.

Paragraph Four: The independent contractor has the right to employ, furnish and supervise qualified licensed drivers to perform independent contractor's assignments in lieu of rendering services directly. These additional drivers must meet the same qualification requirements as the independent contractor himself.

Paragraph Five: The independent contractor agrees that no employer/employee relationship is created under the Agreement between SCI or its customer. The independent contractor is responsible for the payment of all applicable taxes attributable to the independent contractor as a result of the services provided under the Agreement.

Paragraph Six: The independent contractor must furnish occupational accident insurance or workers' compensation for him or herself and all of independent contractor's employees.

Paragraph Eight: The independent contractor is responsible for expenses and normal costs of doing business, including tolls, fuel, oil, tires, repairs, garaging, parking and maintenance of the vehicle and other equipment.

Paragraph Nine: The independent contractor is not required to purchase or rent any products or equipment from SCI or its customers; however, the contractor must furnish equipment compatible with SCI's customer specifications for the performance of the services contracted to by the independent contractor. (In practice, all drivers are required to carry pagers and package scanners that meet certain specifications, which they all rent from the Employer for $86 per month. The Employer then gives them a contract maintenance fee of $100 per month).

Paragraph Thirteen: SCI and its customers are concerned with the result, rather than the method by which the result is achieved.

Paragraph Fifteen: The independent contractor has the right, in its sole discretion, to accept or reject assignments from SCI customers, or any other carrier. (In practice, however, the drivers do not appear able to reject packages). The independent contractor must not load or handle shipments belonging to a competitor company from the same industry type as the Employer with Employer shipments. (Evidence indicates, however, that the Employer and SCI have orally rescinded this prohibition).

2. Work Schedules and Duties.

The drivers' work is substantially the same as before the alleged conversion, with over 90% of the unit drivers working for the Employer. Most of them bid on and were awarded the same routes that they serviced before July 1. The drivers report to the same warehouse, managers, and dispatchers.

During their a.m. shift, the drivers make all of their assigned deliveries. As before the conversion, the Employer provides each driver with a route sheet, which lists the deliveries for that morning and their time priorities. The Employer offers three categories of delivery service with successively relaxed delivery time guarantees: early morning, mid-morning, and end of the day. The precise time guarantee for each category varies by zip code. This customer delivery guide was unchanged by the conversion. At the start of the a.m. shift, the driver reports to the warehouse and electronically scans and loads the packages. Before the driver leaves, the scanning is verified by an Employer dispatcher. Once verified, the driver runs the route, scanning each package as he delivers it, as he did before the conversion. Drivers fill out an invoice form regarding their routes upon their completion and give them to the same Employer worker as before the conversion. SCI sends the independent contractor a settlement check based upon the invoices.

Before July 1, the drivers had a set route for the a.m. shift. Drivers are now free to determine their own routes. In practice, however, the drivers have continued to follow the same route as before, since the original routes were the most efficient.

Before July 1, the drivers also had a fixed starting time for the morning deliveries. Drivers are now ostensibly free to set their own work hours and determine their own delivery schedule for the a.m. shift. The only requirement is that packages have to be delivered before the end of the time frame for the delivery service that the customer selects.

In practice, however, the Employer continues to maintain effective control over the driver's schedules. Drivers with average routes normally report to work at around 6:15 a.m. [*FOIA Exemptions 6, 7(C)*] testified that because his morning route had only 38 stops (compared to an average of 50-60 stops), he was able to make all of his 9:00 a.m. Gold Service deliveries on time by reporting to work at 7:30 a.m. On about November 5, Operations Manager Bob Montez asked [*FOIA Exemptions 6, 7(C)*] if he could report to work earlier. Since [*FOIA Exemptions 6, 7(C)*] was not delivering his packages late, he said that he would not come in any earlier. Montez said he would see to it that [*FOIA Exemptions 6, 7(C)*] came in earlier. Thereafter, the Employer posted a memo changing the Gold Service delivery deadline for [*FOIA Exemptions 6, 7(C)*] route from 9:00 a.m. to 8:00 a.m. [*FOIA Exemptions 6, 7(C)*] contends that there was no business related reason necessitating this change. As a result, [*FOIA Exemptions 6, 7(C)*] has been forced to report to work each morning at around 6:15 a.m.

During the afternoon shift, drivers pick up packages from customers and, at the end of the shift, bring them to the Employer warehouse for shipping. Both before and after July 1, the Employer gives each driver a route pickup sheet listing all of the stops the driver has to make on the afternoon shift, the exact order in which these stops have to be made, and the time that the driver has to arrive at each stop.

3. Vehicles and Insurance.

As before, drivers own their own vehicles and maintain them, pay for fuel and tolls, and carry their own insurance. SCI requires that each driver carry $300,000 in insurance coverage. Drivers now must obtain a DMV permit to drive a business vehicle at a cost of $120 per year. Employees must now pay their own workers compensation type insurance and no longer receive life insurance.

The Employer offers an incentive program for drivers who display the Employer logos on their vehicles. The drivers are otherwise not required to display the logo.

4. Replacement Drivers.

Before conversion, if a driver was sick or on vacation, the dispatcher would find a replacement. After conversion, drivers have the right to find their own substitutes but the substitute must be qualified under the SCI criteria and conditions. In practice, the dispatcher continues to find replacements for absent drivers. The Employer maintains a

pool of casual drivers who receive their pay directly from the Employer/SCI. [*FOIA Exemptions 6, 7(C)*] that he is unaware of any occasion at Hayward where a driver has secured his own replacement.

5. Compensation.

Around the time of conversion, the Employer, not SCI, permitted unit employees to bid on routes. The Employer chose the winning bidder based on the base rate proposed by the bidder, the driver's experience, and his familiarity with the route and customers. Nearly all unit drivers bid on and were awarded their previous routes. New routes that become available are subject to the same bidding procedure.

The SCI Owner/Operator Agreement sets forth the compensation rates for drivers. Before conversion, drivers were paid an hourly wage set forth in the collective bargaining agreement and additional compensation for special deliveries. After conversion, drivers receive about 70 percent of their earnings from a base rate, which is theoretically negotiable. The Employer claims that 10-15 drivers of the approximately 80 drivers at its Hayward facility negotiated a higher base rate. The remaining 30 percent of income is from fixed piece rate amounts for each stop on the route and from extra compensation for special deliveries, such as Gold Service, heavier items, and C.O.D.s. The Employer unilaterally sets the piece rate amounts and the amount of extra compensation for special deliveries. The Employer also sets the amount of the contract management fee ($100 per settlement check) that the drivers receive, and the monthly rental price for the scanner and pager ($86.50). Drivers negotiate the length of the agreement. SCI and/or the Employer unilaterally promulgate all other the terms in the Owner/Operator Independent Contractor Agreements.

Drivers no longer need to account for their time and mileage, earning the base compensation instead. There are no longer any paid holidays or personal days. The drivers must now pay their own taxes quarterly and will receive an IRS Form 1099.

Drivers at some of the Employer's non-union facilities have negotiated increases in their base rate to compensate for increases in the price of gasoline ranging from $1.50 per day to $7.00 per day. The Employer claims that, if a route becomes too busy on a regular basis, the driver can approach the Employer and attempt to negotiate a higher base rate. There is no evidence that a driver had done so or that the Employer has increased the base rate for a route.

6. Working For Other Employers.

Although the terms of the Owner/Operator Agreements preclude drivers from carrying packages for competitors at the same time that they are carrying packages for the Employer, SCI has advised the drivers that they can do this as long as they comply with DOT regulations precluding commingling of packages.

There is, however, little time in the day available for outside work. The drivers must deliver a set number of packages in the appropriate time period in their morning route, and the afternoon routes have a fixed series of stops that are often as little as five minutes apart. The drivers generally do not have a significant block of free time in the middle of their shifts because they need to travel some distance between the morning and afternoon routes. At the end of the afternoon shift, the drivers have to return to the warehouse to drop off packages for shipping. The drivers start early and end late, with little time either before or after their shifts to work for other employers.

The drivers are encouraged to wear Employer uniforms and must remove these uniforms if they work for other companies during their shift. There is no evidence that any drivers at the unionized facilities have worked for other companies since the changeover. The Employer claims that 43 drivers at its nonunion facilities work for other companies, with the percentage of time each such driver spends on these non-Employer deliveries ranging from "sporadic" to 75% of their workday.

7. Other Entrepreneurial Opportunities.

Drivers have the right to hire others or utilize independent contractors to service their routes under the Independent Contractors Owner/Operator Agreement. Drivers can also bid on and service more than one route for the Employer. Since the July 1 conversion, four of the 280 former unit drivers (all in the Burlingame facility) have bid on and been awarded more than one route, and each one has hired one person to assist them. With regard to the non-union facilities, 24 out of 688 drivers service multiple routes. These drivers have hired between one and five independent contractors or employees, qualified them through SCI, trained them, and paid them out of a single SCI settlement check. Some of these drivers have also established their own corporations to manage the routes. The additional drivers do not have to obtain their own DMV permits because they can operate under the driver’s permit.

ACTION

We conclude that, absent settlement, the Region should issue complaint alleging that the drivers remained employees after the July 1 conversion and that the Union did not disclaim interest in representing these employees. We further find that the Effects Agreement is inapplicable and unenforceable because the drivers remained unit employees, and the Effects Agreement is premised on their conversion to independent contractor status. Because the Effects Agreement is unenforceable, the Employer was not authorized to deal directly with employees, and the individual collective bargaining agreements are unenforceable. Thus, the terms and conditions of the expired collective bargaining agreement should be restored pending negotiation of a new agreement.

A. Whether the Drivers Are Employees or Independent Contractors.

Section 2(3) of the Act excludes from the definition of employee "any individual having the status of an independent contractor." In determining whether individuals are employees or independent contractors, the Board applies the common-law test of agency.[4] Under this test, the Board examines all incidents of the parties' relationship, not just those factors relevant to whether an employer has a "right to control" the manner and means of the work.[5] The Board has emphasized that "[n]ot only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors."[6]

The Board, in recent cases, has looked at the following nonexclusive factors derived from the common law agency test: whether the drivers perform a service ancillary to the contractor's business or whether they perform functions that are part of the company's normal operations;[7] the structure

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[4] Roadway Package System, Inc., 326 NLRB 842, 849-850 (1998); see Restatement (Second)of Agency § 220(2)(1958).

[5] Roadway, 326 NLRB at 850.

[6] Id., citing Austin Tupler Trucking, 261 NLRB 183, 184 (1982).

[7] See, e.g., Roadway, 326 NLRB at 851; Corporate Express Delivery Systems, 332 NLRB 1522, 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002); Slay Transportation Co., 331 NLRB 1292, 1294 (2000).

of the work relationship, including the extent of company control over the manner and means of performance;[8] the skills required and training provided;[9] whether the drivers have a proprietary interest in their work;[10] whether the company provides the work instruments;[11] and the opportunity for entrepreneurial risk or profit.[12]

In two seminal 1996 cases, the Board applied this test to determine whether delivery drivers were employees or independent contractors. In Dial-A-Mattress,[13] the Board held that drivers who delivered mattresses for a marketing and distribution company were independent contractors, not employees, where the drivers had the opportunity to, and did, make an entrepreneurial profit beyond their labor and capital investment by hiring their own employees and setting the terms and conditions of employment of their employees. Thus, all drivers employed at least one helper, and over half the drivers had multiple employees and formed their own corporations.[14] In addition, the company had no control over the drivers' selection or maintenance of vehicles, the drivers received no minimum compensation, they could decline work on any given day without penalty, and they could submit contract proposals and attempt to negotiate their pay.[15]

By contrast, in Roadway Package Systems,[16] the Board held that drivers for a shipping and delivery company were employees, not independent contractors, where the company provided a vast array of support plans to reduce the risk to the drivers, including guaranteed van availability, a

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[8] See, e.g., Dial-A-Mattress Operating Corp., 326 NLRB 884, 891 (1998).

[9] See, e.g., Corporate Express, 332 NLRB at 1522; Slay Transportation, 331 NLRB at 1293.

[10] See, e.g., Roadway, 326 NLRB at 853.

[11] See, e.g., Dial-A-Mattress, 326 NLRB at 891.

[12] See, e.g., Roadway, 326 NLRB at 852; Dial-A-Mattress, 326 NLRB at 893.

[13] 326 NLRB at 892.

[14] Id. at 893.

[15] Id. at 892-93.

[16] 326 NLRB at 852.

guaranteed income, assistance in acquiring vans, money loans, and a business support package. The company in Roadway also had substantial control over the drivers manner and means of performance, requiring the drivers to provide service each day and to pick-up and deliver all packages, and controlling the appearance of the drivers and the trucks.[17] Finally, the drivers in Roadway did not have significant entrepreneurial opportunity: only a few used multiple trucks or hired helpers or drivers (3 of 44),[18] and there was no evidence that they could negotiate their compensation.[19]

While this case falls somewhere between Roadway and Dial-A-Mattress, we have concluded that, on balance, the drivers here are employees, not independent contractors.

The drivers here do not perform an ancillary service to the Employer's business but, rather, perform functions that are part of the Employer's normal operations — delivering and picking up packages. Indeed, the drivers here perform functions that are not merely a regular or even an essential part of the Employer's normal operations, but are the very core of its business.[20] Thus, as in Roadway, the drivers here devote a substantial amount of time and labor to perform essential functions that allow the Employer to compete in its market, they do business in the name of the Employer, and their connection and integration in the Employer's business is highly visible.[21]

In addition, the Employer here controls key aspects of the work relationship, including the starting and ending times of the workday, uniforms, the number of packages to be delivered each day, the method of tracking packages, basic order of packages to be delivered and picked up, delivery deadlines, customer service areas, customer accounts, and rates.[22] And, while the Independent Contractor Agreements

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[17] Id. at 844, 853.

[18] Id. at 845.

[19] Id. at 846.

[20] Slay Transportation, 331 NLRB at 1294; see Corporate Express, 332 NLRB at 1522.

[21] See Roadway, 326 NLRB at 851.

[22] See Corporate Express, 332 NLRB at 1522 (noting that routes, base pay, amount of freight, and customers were determined by employer).

may set forth a theoretical right to reject packages, in reality, the drivers must pick-up and deliver what the Employer directs them to and must work each day or report their absence. While the drivers have the theoretical ability to find their own replacements, the replacements must be approved and certified by SCI and are subject to Employer approval and the confidentiality agreement. Given these obstacles, the drivers rely on the dispatchers to continue to find replacement drivers, and the Employer pays the replacements directly. The Employer no longer instructs the drivers on what traffic patterns to take, but since there are tight delivery times and the Employer-provided routes are the most efficient, the drivers follow the same patterns for their deliveries that they followed before the changeover. The Employer also schedules the exact pick-up times for the afternoon deliveries, so that the drivers have no control over their afternoon schedules.[23]

In terms of skills and training, the Employer has continued to provide informal training to new drivers where needed. Thus, the fact that the Employer no longer provides formal job training is not significant where the Employer is informally providing training to new drivers and where the lack of training does not indicate that the drivers have more control over the manner in which their work is performed. While the Employer only hires experienced drivers, no particular skills are required to be a driver.

The drivers have no proprietary interest in their work. Thus, the drivers' theoretical ability to "sell" their routes is meaningless where the evidence indicates that the routes have sold (at nonunion facilities only) for token consideration of one dollar.[24] The Employer supplies instrumentalities of work, including scanners and pages, which the drivers rent but are then reimbursed for in the form of a settlement check each month. While the drivers'

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[23] See, e.g., Slay Transportation, 331 NLRB at 1292 (employer controlled manner and means through training, testing, dispatch operation, and procedures); Standard Oil Co., 230 NLRB 967, 972 (1977) (agents were employees where they did business in company's name with "considerable assistance and guidance" from company).

[24] Compare Roadway, 326 NLRB at 853 (ability to sell route not significant where no evidence that driver has gained or materially profited from sale) with Gold Medal Baking, 199 NLRB 895, 895-96 (1972) (proprietary interest was significant where drivers sold rights under distributorship for sum of $7,000).

maintenance and selection of their vehicles weighs in favor of independent contractor status,[25] the Board has held that drivers who own their own vehicles are employees, not independent contractors, where the employer controls the routes and schedules and where drivers cannot refuse assignments and work exclusively for the employer.[26] Further, vehicle ownership is not persuasive evidence of independent contractor status where drivers are not utilizing their trucks to serve other business customers.[27]

Perhaps most significantly, the evidence of entrepreneurial activity here is more like that in Roadway than in Dial-A-Mattress. A majority of the drivers in Dial-A-Mattress owned multiple trucks and all of the drivers employed at least one helper; by contrast, only four of the 280 unionized drivers here have bid on multiple routes and hired employees. At the nonunion facilities, only 24 of the 688 drivers have done so. While the drivers have the theoretical opportunity to engage in entrepreneurial activity, this potential is insufficient to confer independent contractor status where the employer controls the drivers' ability to exercise that opportunity.[28] Thus, any employees or independent contractors of a driver must be eligible and approved by SCI and the Employer, and the Employer has to approve the workers under the Confidentiality Agreement.[29] Indeed, the entrepreneurial

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[25] See Dial-A-Mattress, 326 NLRB at 891.

[26] R.W. Bozell Transfer, Inc., 304 NLRB 200, 201 (1991); see Corporate Express, 332 NLRB at 1522 (owner-operators who owned their own vehicles were employees where they were not permitted to use their vehicles to make non-employer deliveries, where they purchased insurance through company, where they were required to wear a company uniform, and where they had no proprietary interest in their route and no significant opportunity for entrepreneurial gain or loss).

[27] See Roadway, 326 NLRB at 851 (truck ownership can suggest independent contractor status where "an entrepreneur with a truck puts it to use in serving his or another business' customers.")

[28] See id.

[29] See Slay Transportation, 331 NLRB at 1294 (theoretical ability to hire drivers not sufficient where drivers had to be trained, tested, and approved by employer); Time Auto Transportation, 338 NLRB No. 75, slip op at. 13 (while drivers hired co-drivers or replacements, employer played

opportunities available to the drivers here are similar to those available in Roadway,[30] where the drivers had the theoretical right to bid on multiple routes, to hire additional drivers to service those routes, and even to use additional drivers without prior company approval. Despite this opportunity and the fact that three of the 44 drivers had exercised the opportunity, the Roadway Board found that those employees who had not exercised the opportunity were employees.[31]

The drivers here also do not exercise their theoretical ability to engage in outside work opportunities. And significantly, several obstacles prevent the drivers from doing so, including busy schedules, uniform requirements, and a de facto requirement to work for the Employer each day and accept all packages and deliveries assigned. The theoretical ability to conduct business for other companies during the day is not particularly significant when the drivers have no meaningful opportunity to exercise this right.[32]

As in Roadway, the drivers here also have support plans that reduce the level of entrepreneurial risk. The drivers receive 70 percent of their income in the form a guaranteed base compensation for their route and the remaining 30 percent in the form of guaranteed fixed piece and special delivery rates. Unlike in Roadway, where a "flex" program for overflow work prevented a driver from becoming too busy, the drivers here can negotiate an increase in base rate if their routes become busier. There is no evidence, however, that this has occurred at any of the unionized facilities. Thus, variance in income levels amongst drivers "stems not from drivers' entrepreneurial efforts" but from the difference in base rates based on the routes assigned to the drivers.[33]

Concededly, some factors point in favor of independent contractor status here. The drivers here have more

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integral role in process, requiring approval, forms, and drug testing).

[30] 326 NLRB at 845.

[31] The drivers who employed others were permitted to vote subject to challenge. Roadway, 326 NLRB at 842 fn. 8, 843 fn. 9, 945 fn. 18.

[32] See Roadway, 326 NLRB at 851.

[33] See id. at 853.

entrepreneurial characteristics than the drivers in Roadway, including some ability to negotiate base rates and the theoretical ability to work for others during the workday. These factors, however, are outweighed by the fact that the drivers, as in Roadway, are not exercising entrepreneurial opportunities because of obstacles created by the Employer to doing so.[34]

In sum, we agree with the Region that this case is, on balance, closer to Roadway than Dial-A-Mattress. We find it particularly significant that the drivers are performing the essential function of the Employer's business; the Employer maintains significant control over the drivers' work schedules and manner and means of performance; and the vast majority of employees do not engage in entrepreneurial activities because of Employer barriers to doing so.

B. Whether the Union Disclaimed Interest.

Having determined that the drivers are employees, not independent contractors, the next question is whether the Union disclaimed interest in the drivers by entering into the Effects Agreement and by permitting the Employer to "discharge" the drivers and negotiate independent contractor agreements.

A disclaimer can be express or implied by the union's conduct.[35] To be effective, however, a disclaimer must be "unequivocal," and any assertion that a union has abandoned its claim to representation will be rejected "if the surrounding circumstances justify an inference to the contrary," or if the union's conduct is "inconsistent" with its alleged disclaimer.[36] An otherwise clear and

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[34] Further, while the independent contractor agreement provides that the parties are creating an independent contractor relationship, and the tax and benefit systems is structured as such, this factor has been present in numerous recent cases in which the Board has found drivers to be employees and is thus not determinative. See, e.g., Time Auto Transportation, 338 NLRB No. 75, slip op. at 14; Corporate Express, 332 NLRB at 1524; Slay Transportation, 331 NLRB at 1293; Roadway, 326 NLRB at 846, 848; Elite Limousine Plus, 324 NLRB 992, 994 (1997).

[35] See, e.g., American Broadcasting Co., 290 NLRB 86, 88 (1988).

[36] See Electrical Workers, IBEW (Texlite, Inc.), 119 NLRB 1792, 1798-99 (1958), enfd. 266 F.2d 349 (5th Cir. 1959); Vaughn & Sons, 281 NLRB 1082, 1084 (1986).

unequivocal disclaimer may be rendered ineffective by subsequent union conduct manifesting a continuing claim of representation.[37]

Here, the Union did not disclaim interest, either expressly or impliedly, because it never demonstrated an intent to stop representing the employees. Rather, in response to the Employer's unilateral "conversion" decision, it negotiated an Effects Agreement consistent with its belief that it could no longer legally represent the drivers because they would be independent contractors. The Union never expressed or implied that it would be unwilling to represent the drivers if they were employees.

Moreover, to the extent that the Union's actions and participation in effects bargaining culminating in the May 21 and 30 letters memorializing the Agreement suggest a disclaimer of interest, it was not "clear and unequivocal." Thus, as elaborated below, any claim that the Agreement contains an implicit "disclaimer" by the Union requires acknowledgement that such disclaimer was conditional on another implicit term of the Agreement - that the drivers would become independent contractors.[38] Nothing in the circumstances suggests the Union ever intended to abandon representation of the drivers if this condition was not satisfied.[39] Indeed, within four weeks of the Agreement,

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[37] Local 79, Construction and General Building Laborers (DNA Contracting), 338 NLRB No. 153, slip op. at 3 (2003).

[38] See United Paperworkers Int'l Union (International Paper Co.), 254 NLRB 1332, 1338 (1981) ("condition precedent" is fact or event that parties intend must exist or take place before there is a right to performance of an agreement), citing Williston on Contracts, 3d Ed. 663 at 125-127; Restatement (First) of Contracts, Sec. 250 (1932); see also Cooperative Plus, Inc., Case 30-CA-15000, Advice Memorandum dated April 24, 2000 (union did not unconditionally disclaim interest where it told employer that it would be willing to stop representing the employees if the company would be willing to recognize the employees as an association or their own union; offer was conditional since union did not want the employees to be without representation, and the condition was never met).

[39] See Restatement (Second) of Contracts, Sec. 204, Comment d (1981) (court will supply contract term that parties would have agreed to if question had been brought to their attention); CIT Group/Equipment Financing Inc. v. Integrated Financial Services, Inc., 910 S.W.2d 722, 729-30 (Mo. App. 1995) (while contract contained no explicit term that financing was contingent upon borrower possessing airplane

as soon as it learned that the drivers might not have become independent contractors, the Union took actions inconsistent with any "disclaimer" by filing charges with the Board on June 23 and by demanding on July 2 that the Employer bargain with the Union and provide information about the drivers. Accordingly, we agree with the Region that the Union did not effectively disclaim interest here.

C. Whether the Effects Agreement Is Enforceable.

For the same reason that the Effects Agreement does not operate as a disclaimer of the Union's representative status, it also does not operate as a valid framework governing terms and conditions of the drivers, who remained unit employees at all times. Thus, just as any possible Union disclaimer was implicitly conditioned on the drivers becoming independent contractors, the Employer's right to make the changes outlined in the Effects Agreement was also implicitly conditioned on this change in legal status.[40] The Effects Agreement's terms themselves — providing for termination of the drivers with some severance benefits, giving drivers "priority treatment" in hiring as independent contractors, and permitting the Employer to negotiate individual subcontractor agreements - make clear that the parties negotiated the Effects Agreement to govern the conversion of employees to independent contractors, and all terms of the Agreement assume this conversion will take place.

We have concluded that the implicit premise of the Agreement was not met: the unit drivers remained unit employees. Where the condition precedent for an agreement fails, the contract is void.[41] Thus, while the Agreement

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on which to place engines that were being financed, court implied such a term, reasoning that term gave contract an effect the "parties presumably would have agreed on if, having in mind the possibility of the situation which has arisen, they had contracted expressly in reference thereto"); see also Camden Iron & Metal, Inc. v. Bomar Resources, Inc., 719 F. Supp. 297, 305-06 (D. N.J. 1989) (citations omitted) (terms not specifically set forth in contract may be implied to "give business efficacy to the contract as written").

[40] See citations at fn. 38 and fn. 39, above.

[41] See Authentic Furniture Products, 272 NLRB 552, 555 (1984) (where conditions precedent to issuance of backpay specifications were not met, backpay specification was null and void ab initio; thus, respondent had no duty to answer);

here would have been enforceable if the employees had been converted to independent contractors, without the conversion, the Employer has no right to implement the terms of the Effects Agreement.

We agree with the Region that this situation is akin to an employer's negotiation of an effects agreement because it intends to close a plant and its later decision to leave the plant open. In that situation, the effects agreement clearly could not authorize the employer to terminate employees with benefits provided in the agreement and to continue to run the plant with other employees because the plant was never in fact closed. Similarly, because the unit drivers here never became independent contractors, an Effects Agreement based on this premise has no applicability.

Specifically, the provision in the Agreement authorizing the Employer to enter into independent contractor agreements with the employees has no effect. It is well-established that an employer cannot deal directly with employees who are represented by a freely chosen union without permission from that union.[42] Because the Effects Agreement is unenforceable as to the drivers who remained employees, it cannot operate to give the Employer the Union's permission to deal directly with employees. The resulting individual independent contractors agreements are thus also unenforceable.

In sum, the Region should issue complaint, asserting that the drivers remained employees, not independent contractors; that the Union remains the bargaining representative of these employees; and that the Effects Agreement and the individual independent contractor agreements authorized by the Effects Agreement are unenforceable. Thus, the Employer should restore the terms and conditions of employment of the expired collective bargaining agreement pending negotiation of a new agreement.

B.J.K.

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see also Smith v. McGregor, 376 S.E.2d 60, 75 (Va. 1989) (failure of condition precedent rendered contract void).

[42] See Medo Photo Supply Corp., 43 NLRB 989, 997-98 (1942), enfd. 135 F.2d 279 (2d Cir.), cert. denied 320 U.S. 723 (1943).